

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

SALESTRAQ AMERICA, LLC,

Plaintiff,

v.

JOSEPH A. ZYSKOWSKI and
DEVMARKETING, INC.,

Defendants.

2:08-CV-01368-LRH-LRL

ORDER

Before the court is Defendants Joseph Zyskowski and devMarketing, Inc's motion to dismiss (#7¹). Plaintiff SalesTraq America, LCC ("SalesTraq") filed an opposition (#12) to which Defendants replied (#14).

I. Facts and Procedural History

Because the court considers this case on a motion to dismiss, the complaint's allegations are accepted as true.² *Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664 (9th Cir. 2008).

Plaintiff SalesTraq is a business that provides information regarding the locations and

¹Refers to the court's docket entry number

²The court declines Defendants' request to consider materials outside the pleadings and convert their motion into one for summary judgment. Presently, discovery is still in its early stages, and the evidentiary record appears undeveloped on several important issues.

1 features of residential property in the Las Vegas area. Before SalesTraq's formation, Larry
2 Murphy, SalesTraq's current managing member, compiled and arranged a wide variety of content
3 concerning residential properties in the Las Vegas area. This content includes properties' floor
4 plans, measurements, architectural features, and locations. Moreover, Murphy added content to the
5 compilation that informs users of the properties' key attributes. The court will refer to the
6 compilation and Murphy's added content as the "Murphy IP."

7 Murphy assigned the Murphy IP to SalesTraq upon SalesTraq's formation in August 2003.
8 Currently, the Murphy IP includes information on nearly 17,000 different models of residential
9 property in the Las Vegas area. To provide the Murphy IP to interested persons, SalesTraq
10 maintains a website at salestraq.com ("Website"), which grants access to the Murphy IP on a fee-
11 subscription basis. In addition, on or about the first day of each month, SalesTraq provides a CD-
12 ROM or DVD ("Disc") to subscribers, which contains the entire Murphy IP and new content added
13 during the past month.

14 Defendant Joseph Zyskowski is the president of Defendant devMarketing. In 2007,
15 Zyskowski, purchased a six-month SalesTraq subscription, which allowed Defendants to access the
16 Website and receive monthly Discs. After accessing the Website and receiving at least one Disc,
17 devMarketing established (and currently maintains) a website at devMLS.com. Through its
18 website, devMarketing provides access to content concerning the characteristics of residential
19 properties in the Las Vegas area on a fee-subscription basis. SalesTraq alleges that Defendants'
20 content is similar to the Murphy IP and includes exact reproductions of the content Murphy added
21 to inform customers of properties' key attributes.

22 On January 2, 2008, SalesTraq asked devMarketing to remove all content from its website
23 that infringes SalesTraq's copyright. After devMarketing failed to do so, SalesTraq filed the
24 present lawsuit.

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1 **II. Legal Standard**

2 To survive a motion to dismiss for failure to state a claim, a complaint must satisfy the
 3 Federal Rule of Civil Procedure 8(a)(2) notice pleading standard. *See Mendiondo v. Centinela*
 4 *Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That is, a complaint must contain “a short
 5 and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
 6 8(a)(2). The Rule 8(a)(2) pleading standard does not require detailed factual allegations; however,
 7 a pleading that offers only “labels and conclusions” or “a formulaic recitation of the elements of a
 8 cause of action” will not suffice. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*quoting Bell*
 9 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

10 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,
 11 accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 1949 (internal
 12 quotation marks omitted). A claim has facial plausibility when the pleaded factual content allows
 13 the court to draw the reasonable inference, based on the court’s judicial experience and common
 14 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility
 15 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a
 16 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a
 17 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to
 18 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

19 **III. Discussion**

20 **A. Copyright Infringement**

21 Count One of the complaint alleges Defendants infringed SalesTraq’s copyright in the
 22 Murphy IP by reproducing and displaying substantially all of the content SalesTraq uses to inform
 23 its subscribers of key attributes regarding Las Vegas area properties. Defendants move to dismiss
 24 this count on the basis that (1) this court lacks subject matter jurisdiction to consider an
 25 infringement action because SalesTraq did not comply with the Copyright Act of 1976’s
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1 registration requirements, and (2) SalesTraq's allegations fail to state a claim upon which relief can
2 be granted.

3 **1. Registration**

4 Defendants argue that SalesTraq failed to meet 17 U.S.C. § 411(a)'s requirement of
5 copyright registration prior to initiating a suit for infringement. In pertinent part, § 411(a) states,
6 "[N]o civil action for infringement of the copyright in any United States work shall be instituted
7 until preregistration or registration of the copyright claim has been made in accordance with this
8 title." Courts generally agree that § 411(a) creates a condition precedent to a court's exercise of
9 subject matter jurisdiction in an infringement action. *See* 2 Melville B. Nimmer & David Nimmer,
10 *Nimmer on Copyright* § 7.16[B][1][a] (2008).

11 In the present case, Defendants do not dispute that SalesTraq followed the formalities of
12 filing a deposit, application, and fee with the Copyright Office. Instead, Defendants argue that
13 SalesTraq failed to comply with § 411(a) because it registered a 2008 version of the Murphy IP
14 rather than a 2007 version that Defendants allegedly infringed. The court disagrees. With the
15 exception of dictum in one district court case, *see Shaw v. Lindheim*, 809 F. Supp. 1393, 1402-03
16 (N.D. Cal. 1992), all the authorities cited by Defendants support the proposition that registration of
17 a factual compilation permits a complainant to assert an infringement claim on an underlying work
18 that is owned by the complainant. *See Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 747
19 (2d Cir. 1998); *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 354 F.3d 112, 116 (2d Cir. 2003);
20 *Murray Hill Publications, Inc. v. ABC Communications, Inc.*, 264 F.3d 622, 632 (6th Cir. 2001).
21 The leading treatise on copyrights is also in accord with this proposition. *See* Nimmer & Nimmer,
22 *supra*, § 7.16[B][2][c] ("[W]hen the same party owns the derivative or collective work plus the
23 underlying elements incorporated therein, its registration of the former is 'sufficient to permit an
24 infringement action on the underlying parts, whether they be new or preexisting.'"). Given the
25 weight of this authority, the court concludes SalesTraq has complied with the registration
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1 requirements of 17 U.S.C. § 441(a) as a condition to asserting its infringement claim.

2 **2. Failure to State a Claim**

3 Defendants also argue SalesTraq fails to set forth a cognizable copyright infringement claim
4 because the Murphy IP is comprised only of uncopyrightable facts or ideas as opposed to
5 copyrightable expression. The primary authority Defendants rely upon for their argument is the
6 leading case on the fact/expression dichotomy, *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499
7 U.S. 340 (1991). In *Feist*, a publishing company copied listings from a rural telephone carrier's
8 directory and incorporated those listings into the publisher's directory. *Id.* at 343-44. The carrier
9 sued the publisher for copyright infringement, claiming that the publisher's directory infringed the
10 carrier's directory. *Id.* at 344.

11 On appeal, the Supreme Court held that the carrier's listings were uncopyrightable facts. *Id.*
12 at 361. The Court began its analysis by noting two well-established propositions: first, facts are not
13 copyrightable; and second, compilations of facts generally are. *Id.* at 344. The key to resolving
14 this tension, the Court explained, is the requirement of originality, which "means only that the
15 work was independently created by the author (as opposed to copied from other works), and that it
16 possesses at least some minimal degree of creativity." *Id.* at 345. This requisite level of creativity,
17 the Court elaborated, is extremely low: "[E]ven a slight amount will suffice. The vast majority of
18 works make the grade quite easily, as they possess some creative spark, no matter how crude,
19 humble or obvious it might be." *Id.* (internal quotation marks omitted).

20 The Court also explained that the originality requirement extends to the law's seemingly
21 disparate treatment of facts and factual compilations:

22 Factual compilations . . . may possess the requisite originality. The compilation author
23 typically chooses which facts to include, in what order to place them, and how to arrange
24 the collected data so that they may be used effectively by readers. These choices as to
25 selection and arrangement, so long as they are made independently by the compiler and
26 entail a minimal degree of creativity, are sufficiently original that Congress may protect
such compilations through the copyright laws. Thus, even a directory that contains
absolutely no protectible written expression, only facts, meets the constitutional

1 minimum for copyright protection if it features an original selection or arrangement.

2 *Id.* at 348 (internal citations omitted).

3 Nevertheless, the Court stated, the Copyright Act's protection for factual compilations is
4 necessarily limited:

5 The mere fact that a work is copyrighted does not mean that every element of the work
6 may be protected. Originality remains the *sine qua non* of copyright; accordingly,
7 copyright protection may extend only to those components of a work that are original to
8 the author. Thus, if the compilation author clothes facts with an original collocation of
words, he or she may be able to claim a copyright in this written expression. Others may
copy the underlying facts from the publication, but not the precise words used to present
them.

9 *Id.* (citation omitted).

10 The Court also noted the situation "[w]here the compilation author adds no written expression but
11 rather lets the facts speak for themselves" *Id.* at 349. Under that scenario,

12 [t]he only conceivable expression is the manner in which the compiler has selected and
13 arranged the facts. Thus, if the selection and arrangement are original, these elements of
14 the work are eligible for copyright protection. No matter how original the format,
however, the facts themselves do not become original through association.

15 *Id.* (citation omitted).

16 Thus, the Court explained, "[T]he statute envisions that there will be some fact-based works in
17 which the selection, coordination, and arrangement are not sufficiently original to trigger copyright
18 protection." *Id.* at 358. Under this formulation, "the vast majority of compilations will pass this
19 test, but not all will. There remains a narrow category of works in which the creative spark is
20 utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359.

21 Applying this standard the facts in *Feist*, the Court held that the carrier's telephone listings
22 did not fall within the Copyright Act's protection. While acknowledging that the standard of
23 originality for factual compilations is low, the Court nevertheless found that the carrier failed to
24 meet its burden of showing its listings were copyrightable expression. *See id.* at 362. In the
25 Court's words, the listings "could not be more obvious: It publishes the most basic
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1 information—name, town, and telephone number—about each person who applies to it for telephone
2 service. This is ‘selection’ of a sort, but it lacks the modicum of creativity necessary to transform
3 mere selection into copyrightable expression.” *Id.* The court also found originality lacking in the
4 carrier’s coordination and arrangement of facts, as “[t]he white pages do nothing more than list
5 [the carrier’s] subscribers in alphabetical order.” *Id.* In sum, the court found that constituent
6 elements of the directory fell short of a “*de minimis* quantum of creativity” because its facts were
7 selected, coordinated, and arranged in a way that “utterly lacks originality.” *Id.* at 363-64.

8 Turning now to the case at bar, the court concludes that the facts alleged in support of
9 SalesTraq’s copyright infringement claim meet the notice pleading standard of Federal Rule of
10 Civil Procedure 8(a)(2). Paragraph 10 of the complaint alleges, “Mr. Murphy compiled and
11 arranged a wide variety of content regarding characteristics of different residential properties in the
12 Las Vegas, Nevada geographical area, including those properties’ floor plans measurements,
13 architectural features, location information and other characteristics (the ‘Base Property
14 Content’).” Had SalesTraq alleged only the facts in paragraph 10, the court might agree with
15 Defendants that SalesTraq’s complaint does not plausibly allege that the Murphy IP contains
16 copyrightable expression. That is, paragraph 10 does not allege any facts to show that SalesTraq’s
17 presentation or arrangement of the Base Property Content has any modicum of creativity as
18 required by *Feist*. Nevertheless, the court need not decide that issue because the complaint’s
19 following paragraph sufficiently alleges that the Murphy IP contains copyrightable expression.

20 Paragraph 11 alleges, “As part of the presentment of the Base Property Content, Mr.
21 Murphy authored additional content (the ‘Information Content’) informing Base Property Content
22 users of key attributes of each model of residential property in the Base Property Content”
23 While paragraph 11 does not go into detail about the level of creativity inhering in the Information
24 Content, SalesTraq plausibly alleges the Information Content coordinates or arranges the
25 underlying Base Property Content in such a way that the Information Content possesses a *de*
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1 *minimis* quantum of creativity. In particular, authoring content regarding key attributes of
 2 properties implies a greater degree of creativity than the alphabetization rejected in *Feist*. *See also*
 3 *Urantia Found. v. Maaherra*, 114 F.3d 955, 958-59 (9th Cir. 1997) (finding originality in a book's
 4 selection and arrangement of celestial revelations). The court therefore concludes SalesTraq has
 5 stated a claim for copyright infringement.

6 **B. Violation of the Computer Fraud and Abuse Act**

7 Defendants also move to dismiss Count Three of SalesTraq's complaint, which alleges
 8 fraud under the Computer Fraud and Abuse Act (CFAA) pursuant to 18 U.S.C. § 1030(a)(4). Title
 9 18 U.S.C. § 1030(a)(4) provides,

10 Whoever . . . knowingly and with intent to defraud, accesses a protected computer
 11 without authorization, or exceeds authorized access, and by means of such conduct
 12 furthers the intended fraud and obtains anything of value, unless the object of the fraud
 13 and the thing obtained consists only of the use of the computer and the value of such use
 14 is not more than \$5,000 in any 1-year period . . . shall be punished as provided in
 15 subsection (c) of this section.

16 Subsection (g) provides for civil enforcement of 18 U.S.C. § 1030(a)(4).

17 In the present case, SalesTraq alleges Defendants obtained a license to access the Website
 18 but exceeded their authorized access by copying content from the Website and using that content
 19 for Defendants' commercial use. (Compl. (#1) ¶¶ 53, 54.) This allegation, however, does not
 20 raise a right to relief under 18 U.S.C. § 1030(a)(4). There is a crucial difference between misusing
 21 information properly accessed and exceeding one's authorized access to obtain restricted
 22 information. This case falls into the former category, as SalesTraq acknowledges in its complaint
 23 that Defendants paid to access the content on SalesTraq's Website. (*See id.* ¶ 20); *see also U.S.*
 24 *Bioservices Corp. v. Lugo*, 595 F. Supp. 2d 1189, 1192 (D. Kan. 2009) ("[A]ccess to a protected
 25 computer occurs 'without authorization' only when initial access is not permitted, and a violation
 26 for 'exceeding authorized access' occurs only when initial access to the computer is permitted but
 the access of certain information is not permitted."). Defendants' motion to dismiss is therefore

1 granted as to Count Three.

2 **C. State Law Claims**

3 **1. Preemption**

4 Defendants also move to dismiss SalesTraq's claims for commercial misappropriation,
5 unjust enrichment, and breach of a nonexclusive license on the basis that these claims are
6 preempted by 17 U.S.C. § 301(a), which provides that federal copyright law preempts any other
7 "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope
8 of copyright" *See also Oddo v. Ries*, 743 F.2d 630, 635 (9th Cir. 1984).

9 Preemption analysis under the Copyright Act involves determining whether a state claim
10 contains an element that changes the nature of the action so that it is qualitatively different from a
11 copyright infringement claim. *See Summit Mach. Mfg. Corp. v. Victor CNC Sys., Inc.*, 7 F.3d
12 1434, 1439-40 (9th Cir. 1993). Under this analysis, if an act of copyright infringement also
13 necessarily violates a state created right, the state created right is preempted. *See id.* at 1440; *G.S.*
14 *Rasmussen & Associates, Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 904 (9th Cir. 1992).

15 Defendants argue SalesTraq's state claims are preempted by the Copyright Act because
16 each of the state claims merely alleges that Defendants unlawfully copied the Murphy IP. The
17 court disagrees. The Ninth Circuit considered a similar case in *G.S. Rasmussen & Associates, Inc.*
18 *v. Kalitta Flying Service, Inc.*, where the court faced the issue of whether a plaintiff's claims for
19 conversion and unjust enrichment were preempted by the Copyright Act. 958 F.2d 896 (9th Cir.
20 1992). The plaintiff in *Rasmussen* engineered modifications to a DC-8 aircraft that allowed the
21 plane to carry significantly more weight. *Id.* at 899. In order to obtain the FAA's approval for the
22 modifications, however, the plaintiff had to obtain an FAA certificate. *Id.* After the plaintiff
23 succeeded in this endeavor, the defendant used a copy of the plaintiff's FAA certificate to obtain
24 FAA approval for its own modified DC-8. *Id.* at 899-900.

25 On appeal, the Ninth Circuit held that the plaintiff's unjust enrichment and conversion
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1 claims were not preempted. The court reasoned that were the plaintiff claiming an exclusive right
2 to copy the FAA certificate, which was an uncopyrightable government form, his claim would be
3 preempted by the Copyright Act. *Id.* at 904. The court, however, distinguished the plaintiff's
4 claims from the mere act of copying:

5 Enforcement of [the plaintiff's] property right in his [certificate] leaves [the defendant]
6 free to make as many copies of the certificate as it wishes That [the defendant] is
7 prevented from then using these copies to obtain an airworthiness certificate from the
8 FAA does not interfere in any way with the operation of the copyright laws.

8 *Id.* Thus, the court made a key distinction between a claim for improper copying of the
9 certificate—which would be preempted—and a claim for improper use of the certificate—which was
10 not preempted.

11 In the present case, SalesTraq's state claims allege, not only that Defendants copied the
12 Murphy IP, but also that Defendants used the Murphy IP for their own commercial benefit in
13 violation of state law. Thus, under *Rasmussen*, SalesTraq's allegations change the nature of its
14 state claims so that they are qualitatively different from a copyright infringement claim.
15 SalesTraq's state claims are therefore not preempted by the Copyright Act.

16 **2. Failure to State a Claim**

17 Defendants also move for dismissal of SalesTraq's state claims on the basis that they fail
18 to state a claim upon which relief can be granted. Defendants first argue the state claims must fail
19 because they all reference a September 2008 edition of the Murphy IP rather than a 2007 edition
20 from which Defendants claim they copied. Defendants' argument is without merit. Although
21 SalesTraq's state claims do reference the September 2008 edition, the complaint's allegations can
22 also be plausibly read to allege Defendants' misuse of an earlier edition. (*See* Compl. (#1) ¶¶ 20-
23 26.)

24 Defendants also attack the sufficiency of SalesTraq's breach of a nonexclusive license
25 claim on the basis that it fails to allege an explicit agreement limiting Defendants' use of the
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1 Website's content. Again, Defendants' argument is not well-taken. Even if the terms of
2 SalesTraq's license were not explicitly stated, SalesTraq allegations suffice to state a claim for an
3 breach of an implied license agreement. *Smith v. Recrion Corp.*, 541 P.2d 663, 665 (Nev. 1975)
4 (discussing elements of a claim for breach of an implied contract).

5 **IV. Conclusion**

6 SalesTraq's allegations concerning the character of the Murphy IP suffice to show that the
7 Murphy IP is at least partially comprised of copyrightable expression. SalesTraq has therefore
8 stated a claim for copyright infringement.

9 Because SalesTraq's CFAA count does not allege Defendants accessed restricted
10 information in an unauthorized manner, SalesTraq has failed to allege facts to support a claim
11 under 18 U.S.C. § 1030(a)(4).

12 Finally, because SalesTraq's state claims allege that SalesTraq improperly used the Murphy
13 IP, these claims are not preempted by the Copyright Act. SalesTraq's state claims also state a
14 claim for relief under Federal Rule of Civil Procedure 8(a)(2).

15 IT IS THEREFORE ORDERED that Defendants' motion to dismiss (#7) is GRANTED in
16 part and DENIED in part.

17 IT IS SO ORDERED.

18 DATED this 10th day of June, 2009.



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21 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE